IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-820

BRIGHT D. OKAGBARE,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on September 3, 1976 and Petition for rehearing with suggestion for rehearing en banc being denied October 26, 1976.

CITATIONS OF OPINIONS BELOW

The opinion of the Immigration Judge finding petitioner excludable and ordering him excluded and deported from the United States, July 26, 1974. The Decision of the

Board of Immigration Appeals affirming the decision of the Immigration Judge January 31, 1975. Decision of the Court of Appeals dismissing the Petition for Review September 3, 1976. Denial of Motion for rehearing with suggestion for rehearing en banc October 26, 1976.

JURISDICTION

The Order of the Court of Appeals was entered October 26, 1976. Jurisdiction of this Court is invoked under Title 28, Section 1254 (1) U.S.C.

STATEMENT OF THE QUESTION INVOLVED

Whether an alien who has F-1 student status is entitled to a Deportation (rather than exclusion) Hearing upon his return from a brief visit to his native country, where it is charged that he violated his student status prior to leaving, but the violation was not discovered until after his return?

STATEMENT OF THE CASE

Prior to September 5, 1971, petitioner had attended school under F-1 status. On September 5, 1971, after checking with the Local Immigration office and his school, and while his F-1 status was valid, petitioner left the United States for his native country, Nigeria, to attend to matters necessitated by the occurrence of the civil war there. When he returned on September 22, 1971, he brought four minor children who had been left behind originally with their mother, but then later with others when his wife (the children's mother) joined him in the United States. When petitioner arrived in New York City, he appeared as a non-immigrant student, returning to continue his studies in the F-1 status that he had been accorded prior to his leaving, and valid at the time of his departure. He was refused clearance for entry at New York, and inspection was deferred to Detroit, Michigan.

On July 6, 1971, petitioner gave a sworn statement to Detroit Immigration officials as to his admissibility to the United States. On July 28, 1971, a hearing in Exclusion Proceedings was commenced. On August 2, 1974, the Immigration Judge ruled that petitioner was excludable because at the time of his return from Nigeria, he was not carrying the proper documents. Petitioner was carrying a copy of his approved form I-20B which he had obtained from his school after discussing his planned trip with both school officials and Immigration officials. The basis of the Judge's ruling was that petitioner was intending to return to full-time employment in violation of the F-1 status, rather than resume his studies. Petitioner had been granted permission to work part-time from June of 1971 to June 30, 1972, by the Immigration Service.

The Board of Immigration Appeals affirmed the ruling of the Immigration Judge. The Sixth Circuit Court of Appeals declined to review the cause on Jurisdictional grounds.

This Court extended the time within which a petition for certiorari may be filed to December 15, 1976.

REASONS FOR GRANTING THE WRIT

I.

WHEN AN ALIEN HAS BEEN GRANTED AN F-1 STUDENT AND RESIDED IN THE UNITED STATES UNDER THAT STATUS, AND MAKES A BRIEF VISIT TO HIS NATIVE COUNTRY WHILE IN A VALID F-1 STATUS, HIS RETURN TO THE UNITED STATES DOES NOT CONSTITUTE AN "ENTRY", THEREFORE, HE IS ENTITLED TO DEPORTATION PROCEEDINGS RATHER THAN EXCLUSION PROCEEDINGS.

The undisputed evidence in this cause showed that petitioner had attended Shaw College at Detroit under a valid F-1 student status from the fall of 1970 until the time of his departure for a visit of less than three weeks duration to his native country. It is further undisputed that at the time of his departure his F-1 status had not been revoked, and upon his return he resumed his academic pursuit at Shaw College. He presented a copy of his Form I-20, showing that he had approved F-1 status. He was denied entry, but was granted parole.

Prior to leaving the United States, petitioner made inquiry of the Immigration officials and school authorities as to what documents he would need in connection with his planned trip to his native country. He was led to believe that the only item he would need upon his return was the form I-20 showing his approved F-1 status, and for that purpose he was given a copy of his form I-20 which had been approved by the Immigration Service and Shaw College. Consequently, upon his return, he had no reason to expect that his return would be questioned.

Since petitioner was in valid F-1 status when he left the United States, his (attempted) return on September 22, 1971 did not constitute an "entry", therefore, he was entitled to deportation proceedings rather than exclusion proceedings. Petitioner's case is closely analagous to *Ponciano Maldonado-Sandoval* v. *United States Immigration and Naturalization Service*, 518 F.2d 278 (9th Cir. 1975):

> "At the time of his attempted return to the United States petitioner had already been granted the status of permanent resident alien. His brief visit to Mexico did not manifest 'an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence'. (Rosenburg v. Fleuti, supra, 374 U.S. at 462, 83 S. Ct. at 1812.) Thus petitioner was not subject to exclusion proceedings. To deprive petitioner of the benefits of deportation proceedings in the determination of his case merely because of his brief visit across the border would do violence to both the letter and the spirit of Fleuti:
>
> > "(A) n innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." 374 U.S. at 462, 83 S.Ct. at 1812.

In the instant case, petitioner was questioned by an Immigration official at New York, and since he concluded that he did not have the proper travel documents, and his answers indicated that he may have violated his student status prior to leaving the United States, inspection was deferred to Detroit, and after a sworn statement was given by petitioner, exclusion proceedings were commenced.

When evidence appears during an exclusion hearing, that the alien has been theretofore granted residence status

and is seeking to return to the United States after a brief visit outside the United States, the exclusion proceeding shall be terminated. *Maldonado-Sandoval* v. *United States Immigration and Naturalization Service,* supra. In the instant case, it was shown at the exclusion proceeding that petitioner had been granted F-1 student status, accordingly, the exclusion proceeding should have been terminated.

During the course of the hearing, respondent offered testimony from questionable employment records for the proposition that petitioner had worked full time in violation of his student status, and that upon his return he was intending to return to his fulltime employment, rather than his student status. Assuming, without agreeing, that petitioner had worked full time in violation of his student status prior to leaving the United States, this might have been grounds to deport him. However, the *Maldonado-Sandoval* case, supra, states at page 281:

> ". . . If there is also evidence that the alien may have fraudulently secured his residence status, the INS can thereupon institute deportation proceedings against him."

The differences between deportation and exclusion proceedings are significant. The most significant difference is that in a deportation proceeding, the burden is upon the INS to show deportability, whereas in exclusion proceedings, the burden is on the alien to show admissibility. In the instant case, the Immigration Judge incorrectly ruled that petitioner had to prove admissibility beyond a reasonable doubt.

In the instant case since petitioner should have been granted deportation proceedings rather than exclusion proceedings, for appellate purposes this Court should consider this cause as though it were a deportation case. In so

doing, the applicable rules as to burden of proof should apply, and the Jurisdiction of the Court of Appeals to review directly the decision of the Board of Immigration Appeals would also apply. Under these circumstances, a different result is highly probable:

> "It is certainly possible that if petitioner had been given the benefit of deportation proceedings, his cause might have been successful. Therefore, the relief petitioner seeks, a de novo determination of his case in deportation proceedings — is not insubstantial." *Maldonado-Sandoval,* supra, p. 280.

CONCLUSION

A sense of justice and concern for fair and proper treatment of citizens from other countries who choose this country to pursue educational goals, and to insure that their objectives are not frustrated by the improper administration of Immigration laws by administrative agencies compels this Honorable Court to grant Certiorari in this cause.

Respectfully submitted,

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APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A17 872 622 – Detroit
July 26, 1974

In The Matter Of
BRIGHT D. A. OKAGBARE,
Applicant.

IN EXCLUSION PROCEEDINGS

Excludable:

I&N Act, Section 212 (a) (20) – Immigrant not in possession of immigrant visa

APPLICATION: Admission to resume status in the United States as a non-immigrant student

IN BEHALF OF APPLICANT:
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IN BEHALF OF SERVICE:
Adolph F. Angelilli, Esq.,
Trial Attorney
Detroit, MI 48207

DECISION OF THE IMMIGRATION JUDGE

The applicant in this exclusion proceeding is a married, male alien, age 38, a native and citizen of Nigeria. As shown in Group Exhibit 5, Memorandum of an Immigrant Inspector at Detroit, Michigan dated July 7, 1972, the applicant originally entered the United States as a visitor for pleasure on February 21, 1967 and thereafter, his previously denied application to change status to that of a student was approved on his motion for reconsideration. The memorandum of July 7, 1972 need not be discussed further but it sets out in some detail, applicant's immigration history, which includes a record of unauthorized employment at Shawnee, Oklahoma and "wherever else the Okla. State Employment Service referred him." On or about September 5, 1971, he returned to Nigeria and as claimed during the Nigerian hostilities, some sections of his plantation which he owns in Nigeria (56 acres) was bombed by the enemy and set afire so he went home to replant and repair the damage that was done to his land and house (R. 56). The applicant is married. His wife is now illegally in the United States having accepted unauthorized employment as the spouse of a student and he has two minor children born in the United States during his presence in this country since 1967. He has four children remaining in Nigeria, Augustine, age 11, Veronica, age 13, Gladys, age 15 and Kyss, age 18. These children were issued nonimmigrant visas, Class F-2, to come to the United States upon the applicant's return, the visas having been issued at Monrovia, Nigeria. When the applicant departed from the United States he was in a valid student status as he had been granted an extension of time to June 30, 1972 (Exhibit 3). He sought to enter the United States arriving Pan American Air, Flight 187 at John F. Kennedy

Airport, New York City, on September 22, 1971 (Exhibit 2). His four children accompanied him and sought admission as children of a foreign student, Class F-2. None were admitted but the inspection of the applicant was deferred to Detroit, Michigan for further examination to be held at Detroit, Michigan on September 29, 1971. These cases of the four children were likewise deferred for determination in the case of the father, the principal applicant. The reason for the deferred inspection is shown in the remarks column, No. 13 of Form I-160 (Exhibit 6), which reads as follows:

> "Subject arrived on PA 187 from Monrovia with a RT Ticket originating at Detroit. Subject arrived with his 4 children, Veronica (DOB 8-6-60), Gladys (DOB 8-6-58), Augustine (DOB 4-3-62), and Kyss M (DOB 2-5-55). All the children have F-2 visas issued 9-21-71 at Monrovia. Subject's passport reflects that he was given V/D at Dallas October 5, 1967 and subject just left the US on September 7, 1971. Subject states that his wife and 6 month old son is in Detroit at the moment. Subject presented a I-20 issued by the Shaw College at Detroit. Subject states that he is the owner of two Bldgs and is working selling drugs and medical supplies here and in his country.
>
> G-56 issued for subject and his children arriving from Monrovia possibly violating his status."

Applicant did appear on the proper date for deferred inspection but was asked to return as he was not then in possession of Form I-20, Certificate of Eligibility of Foreign Student, transcript of his grades, his passport and arrival-departure record (Exhibit 5, Report of Immigrant Inspector Wahl, dated July 7, 1972). It was not until July 6, 1972 that the applicant did appear for a further examination, at which time a record of sworn statement was taken from him (Exhibit 5). In his shown statement he

testified that he had been employed at Chrysler Corporation in Detroit, working Monday through Friday, five days a week on the afternoon shift after school. Exhibit 3 is the application wherein the applicant sought permission to accept part-time employment, which part-time employment was authorized to expire June 30, 1972. The application was submitted to the Service on June 2, 1971 and also was his application for extension of stay, which was granted.

It must now be noted that in Exhibit 3, the application for part-time employment, the respondent stated at Number 17, that he had not been previously employed in the United States and failed to complete that block showing the name and address of any previous employer, when the employment began and the income he had received, if any.

This record of proceeding consists of 97 pages. This is regrettable in that the sole issue is whether or not the applicant upon his return from Nigeria on September 22, 1971, intended to resume full time unauthorized employment. The answer, based on the evidence of record, must be in the affirmative. As is shown in the letter of May 18, 1972, which is a part of Group Exhibit 6, his employment began at the Chrysler Corporation on October 9, 1969 and continued on the date the letter from J. Kotes, Employment Supervisor, was written.

One Richard S. Kowaleski, an Employment Services Supervisor with the Chrysler Corporation, Hamtramck Assembly Plant, appeared as a witness, inasmuch as letter of May 18, 1972 concerning the employment was strenuously objected to. Mr. Kowaleski appeared as a witness and brought the original employment record of the applicant to the hearing and these records are in evidence. These records support the letter of May 18, 1972 but go

further to show that the applicant had continuous full time employment. The applicant was considered a full time permanent employee of the Corporation from on or about October 27, 1969 until October 17, 1972 with various temporary absences and leaves. This employment was previously admitted by the applicant when he made the sworn statement of July 6, 1972 (Exhibit 5, p. 2, 3). Mr. Kowaleski's testimony concerning the employment at Chrysler will be found in the record at pages 72-73, 77.

The trial attorney endeavored to limit the lengthy questioning considering that the issue was very narrow and stated, R. 57:

> "Mr. Special inquiry officer, this entire line of questioning, because this man has been served with a document, the I-110 and the I-122, and those documents are very clear, they are very specific, the only question before the special inquiry officer is, was he returning to a full time employment or was he not? Everything else we have discussed so far is academic and of no value. The issue here must be resolved as to whether or not he has full time employment. The Service can introduce any evidence in an Exclusion Hearing to rebut his testimony, he has given a statement in which he admits full time employment, we have an investigative report which has been offered, we have a letter from the employer showing full time employment. All of this is misleading and irrelevant to the question before the special inquiry officer."

The trial attorney made like comments concerning the case, R. p. 70, when he stated:

> "Well sir, if you want me to put the Service explanation on the record, I certainly will. Mr. Kote called the special inquiry officer and he discussed the need for him to come and if he could send someone else and the decision was made with regard to this ques-

tion. It was decided in the favor of him being permitted to send someone else. I'll go along with the special inquiry officer on that decision and it is my belief that the only question before us is whether or not Mr. Okagbare had a permanent type job and whether or not when he returned on September 22, 1971 that he actually was returning to his permanent type job at the Chrysler Corporation, which he has denied and I don't think that anything more need be done except that someone who has access to the true records come here and tell us what the true records say. No claim is being made that Mr. Kowalewski or Mr. Kotes knows Mr. Okagbare personally. This is not a criminal case in which the witness is trying to prove the man's guilt. This is an exclusion hearing on which the burden is on the alien and even hearsay as long as it is relevant, is admissible in a hearsay case."

I am satisfied on the basis of this voluminous record, that the applicant intended to resume his employment upon his return from abroad when he sought entry to continue his studies. The applicant has not carried his burden of proof to show that at the time of his return, he was only seeking to return as a student to possibly a part-time employment. The applicant has not carried the burden of proof to establish his admissiblity. The above will serve as my findings of fact and conclusions of law and the following order is entered:

ORDER: IT IS ORDERED that the applicant be excluded and deported from the United States.

/s/ ROBERT F. BODE
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

(Filed January 31, 1975)

File: A17 872 622 — Detroit

In re: BRIGHT D. A. OKAGBARE

IN EXCLUSION PROCEEDINGS

APPEAL

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ON BEHALF OF I&N SERVICE:
Adoplh F. Angelilli
Trial Attorney

EXCLUDABLE: Section 212 (a) (20), I&N Act (8 U.S.C. 1182 (a) (20)) — Immigrant not in possession of immigrant visa

APPLICATION: Admission to resume status in the United States as a nonimmigrant student

This is an appeal from a decision of an immigration judge directing the exclusion and deportation of the applicant. The appeal will be dismissed.

The record relates to a male alien, a native and citizen of Nigeria, who entered the United States on February

21, 1967 as a nonimmigrant visitor. Thereafter, his status was changed to that of student. On September 5, 1971, he returned to Nigeria. He sought to enter the United States on September 22, 1971. Neither he nor his four children were admitted. Their inspection was deferred. The applicant's wife is illegally in the United States.

A hearing was held on July 26, 1972 to determine if the applicant was returning to full-time employment or to continue his studies. The immigration judge concluded that at the time of his return the applicant was not seeking only to return as a nonimmigrant student with possibly part-time employment.

The record shows that the applicant was employed full time by the Chrysler Corporation from October 9, 1969 to December 11, 1969; from May 8, 1970 to January 19, 1970; from July 14, 1970 to August 1970; from September 21, 1970 to December 23, 1971 and from January 24, 1972 to July 7, 1972. The record also shows that on July 6, 1972 the applicant admitted to an immigration officer (1) that he must work full time to support his family in the United States; and (2) that he bought a house in Detroit, Michigan.

Under section 214(b) of the Immigration and Nationality Act (8 U.S.C. 1184), an alien is presumed to be an immigrant until he establishes to the satisfaction of the immigration officer at the time of his application for admission that he is entitled to a non-immigrant status under section 101 (a) (15) of the Act (8 U.S.C. 1101). From our review of the record, we find that the applicant has not met his burden in this respect. Every immigrant is required to present a valid immigrant visa or be excludable from the United States under the provisions of section 212 (a) (20) of the Act. It is clear that at the time the applicant departed from the United States to Canada he

had lost his student status. The fact that he was attending Shaw College full time and that he was told by the Service that he was in a valid student status is immaterial. He failed to comply with the conditions of his student status, in that he was employed full time without receiving permission from the Service.

We further find that the evidence presented by the Service is credible and sufficient to sustain its burden of proving that the applicant had involved the terms of his admission and was not returning to an unrevoked nonimmigrant student status. The applicant, as an immigrant not in possession of a valid unexpired immigrant visa or document in lieu thereof, was therefore inadmissible to the United States under the provisions of section 212 (a) (20) of the Act.

We make the following brief comment on counsel's contention in his brief: (1) *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1952), cited by counsel, is inapplicable in this case because *Kwong Hai Chew* related to a former lawful permanent resident. Here the alien is a nonimmigrant student. (2) The burden of proof was on the applicant to establish by a preponderance of the evidence that he was admissible. This burden he failed to meet.

Our careful review of the record satisfies us that the proceedings were fair and that there is substantial credible evidence to support the immigration judge's decision.

We concur with the immigration judge that the evidence in the record supports the conclusion (1) that the applicant is not a bona fide nonimmigrant student; and (2) that he has failed to establish his eligibility as a nonimmigrant and must be considered an immigrant pursuant to section 214 (b) of the Act. Therefore, the immigra-

tion judge was fully warranted in finding the applicant excludable under section 212 (a) (20) of the Act. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ LOUISA WILSON
Acting Chairman

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1593

BRIGHT D. OKAGBARE,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ORDER

(Filed September 3, 1976)

Before: PECK, McCREE and LIVELY, Circuit Judges.

Respondent's motion to dismiss, purportedly filed under Rule 8, Rules of this Court, was not filed within the time permitted by said Rule, and is therefore denied. However, it appearing that this Court is without jurisdiction to entertain this petition for review filed by an alien in an exclusion proceeding (as distinguished from a petition filed by an alien in a deportation proceeding, 8 U.S.C. § 1105a (b) ; see *Maldonado-Sandoval* v. *Immigration and Naturalization Service*, 518 F.2d 278, 280 (9th Cir. 1975)), the Court on its own motion

ORDERS that this proceeding be and it hereby is dismissed for want of jurisdiction. Rule 8 (b) , Rules of this Court.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1593

BRIGHT D. OKAGBARE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ORDER

(Filed October 26, 1976)

Before: PECK, McCREE and LIVELY, Circuit Judges.

Petitioner's motion for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the motion has been referred to the panel which heard the appeal, and it further appearing that the motion for rehearing is without merit,

IT IS ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk of Court